Supreme Court, U. S.
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78-1864

No.

In The Supreme Court Of The United States

October Term, 1978

MAE LILLIAN BROWN,
a/k/a "CHI CHI,"
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[redacted]

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No.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF PETITIONER

To The Honorable, The Chief Justice and Associate Justices of The Supreme Court of the United States:

Mae Lillian Brown a/k/a "Chi Chi," (hereinafter "Brown"), the petitioner herein, prays that a writ of certioriari issue to review the judgment of The United States Court of Appeals For The Tenth Circuit entered in the above-entitled case on the 15th day of February, 1979.

Opinions Below

The opinion of the United States Court of Appeals For The Tenth Circuit is unreported and is printed in Appendix "A" hereto, *infra.*, p. 1a. The judgment of the United States Court of Appeals For The Tenth Circuit is printed in Appendix "D" hereto, *infra.*, p. 28a. The journal entry of judgment of the United States District Court For The Northern District of Oklahoma is printed in Appendix "C" hereto, *infra.*

Jurisdiction

The judgment of the United States Court of Appeals For The Tenth Circuit was entered on February 15, 1979. A timely petition for rehearing and suggestion for rehearing in banc was denied on April 27, 1979. On May 1, 1979 the order of April 27, 1979 was vacated and in lieu thereof a corrected order was entered (Appendix "D," *infra.*, p. 30a). The jurisdiction of the Supreme Court is invoked under Title 28, United States Code, §1254(1).

Question Presented

The proof at trial may have been sufficient to support the conclusion that each defendant, including Brown, participated in separate individual conspiracies with the central actor of the alleged single conspiracy, a large drug dealer, to violate the provisions of 21 U.S.C. §841(a)(1) and 843(b). The question thus presented is: Is such proof of individual conspiracies, coupled with evidence of large amounts of narcotics being distributed, sufficient under *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946) to impose guilt upon Brown as a knowing participant in a single conspiracy to violate the foregoing federal narcotics laws?

Statutory Provisions Involved

This case involves a charge under 21 U.S.C. §846 of

conspiracy to violate certain of the federal narcotics laws, to-wit: 21 U.S.C. §841(a)(1) and 21 U.S.C. §843(b). Said statutes, and sections thereof, read as follows:

> *21 U.S.C. §846:* "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."
>
> *21 U.S.C. §841(a)(1):* "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —
>
> (1) To manufacture, distribute or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance."
>
> *21 U.S.C. §843(b):* "It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter. Such separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term 'communication facility' means any and all public and private instruments used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, and all other means of communication."

The case also involves the charge that Brown violated the substantive provisions of 21 U.S.C. §843(b), *supra.*

Statement of the Case

The Indictment.

On March 29, 1977 Brown and fourteen others were

charged by indictment with violation of 21 U.S.C. §846 as follows:

> "1. Knowingly and intentionally to possess with intent to distribute and to distribute heroin, a Schedule I narcotic drug controlled substance, contrary to Title 21, United States Code, Section 841(a)(1);
>
> 2. Knowingly and intentionally to possess with intent to distribute and to distribute cocaine, a Schedule II narcotic drug controlled substance, contrary to Title 21, United States Code, Section 841(a)(1);
>
> 3. Knowingly and intentionally to use a communication facility, that is a telephone, in committing, causing the commission of, and facilitating the commission of the possession with intent to distribute, and the distribution of, narcotic drug controlled substances, which are felonies under Title 21, United States Code, Section 841(a)(1), contrary to Title 21, United States Code, Section 843(b)."

The conspiracy charged is alleged to have occured from January 1, 1977 to February 12, 1977. The central figure of the claimed conspiracy was one John Hubert Thompson ("Thompson"). According to the indictment, the objects of the conspiracy were to be accomplished by Thompson's procuring of heroin and cocaine from conspirator James Calvin Anderson and "others" and the transportation of the narcotics by Thompson to Tulsa, Oklahoma. It is charged that Thompson then diluted the drugs, repackaged them in smaller quantities, and resold the drugs to "various other co-conspirators" who are alleged to have diluted and/or repackaged the drugs and resold the same to other customers. Defendant co-conspirators Carlette Jones (Thompson's daughter) and Karen R. Brooks are charged with furthering the conspiracy by receiving orders for narcotics from customers, transmitting the orders to Thompson, and selling heroin for Thompson. The indictment further states that large quantities of heroin and diluting materials would be stored by Anderson at his residence in Fresno, California and that Thompson made distributions of large quantities of drugs in Fresno, California.

It is claimed in the indictment that the foregoing objects of the conspiracy were effected by the fifteen named defendants and the unindicted co-conspirators through the commission of approximately sixty-six overt acts in the Northern District of Oklahoma and elsewhere. Substantially all of the overt acts charged in the indictment involved intercepted wire (telephone) communications allegedly relating to transactions in narcotics involving the defendants and other co-conspirators.

Count I of the indictment sets forth the conspiracy described above. All but two of the remaining counts (II and XVII) involve the separate charge that Thompson and one other co-conspirator (depending on the count) violated 21 U.S.C. §843(b) by knowingly and intentionally using a communication facility, namely a telephone, in committing, causing the commission of, and facilitating the commission of the knowing and intentional possession with intent to distribute and the distribution of controlled substances, felonies under 21 U.S.C. §841(a)(1).[1]

The Evidence.

Karen Brooks ("Brooks"), an alleged co-conspirator and defendant, was the government's chief witness at trial. She testified that she distributed drugs for Thompson, primarily $50.00 quantities of heroin and cocaine. As a result of her work for Thompson she would be paid from $300.00

---

[1]Counts XI and XIV are the only counts (apart from Count I) which do not involve alleged violations of 21 U.S.C. §843(b). These counts claim that Thompson violated 21 U.S.C. §841(a)(1) by the distribution of heroin.

to $500.00 per day. If Thompson's supply of heroin and/or cocaine were depleted, she would refer customers to other defendants, including Brown. She further testified on direct examination that in late January or early February, 1977 she was present when Brown purchased two quarter-ounces of heroin from Thompson. Brooks concluded her direct examination by stating that Brown, and the other defendants on trial, each live in North Tulsa and know each other, and that Brown was acquainted with James Calvin Anderson, a/k/a Pete, an alleged co-conspirator from California.

On cross-examination it was stipulated that Brooks had pled not guilty to the indictment and waived trial by jury. Brooks testified that it was her understanding that if she were to testify in this case, the charges against her might be dismissed or she may receive probation. She further stated on cross-examination that she had never personally witnessed Brown selling or distributing narcotics. Brooks further testified that her statement on direct examination that Brown distributed heroin was based on telephone calls she had received from Brown wherein Brown stated that "somebody wants something." She testified that on two occasions Brown called her requesting narcotics. According to Brooks, the first call was in January or February and Brown had requested a $50.00 quantity of heroin. Brooks testified that she advised Brown that she did not have any heroin. She testified to a second telephone conversation wherein Brown allegedly "needed some dope." Brooks did not know whether Brown ever received any drugs as a result of that alleged call.

On further cross-examination and then upon redirect examination by the government, Brooks admitted that the claimed occurrences at Thompson's house whereby Brown allegedly purchased heroin from Thompson did not occur

in late January or early February, 1977 as originally testified to.[2]

The evidence presented against Brown, apart from the Brooks testimony, consisted of tape recordings of telephone conversations. To the extent that such conversations were intelligible, they apparently involved attempts to purchase cocaine from Thompson. Some of the calls involve conversations between Thompson and Brown, others involved calls between Thompson and third parties, and still others involved conversations between Brown and the defendant Charles Etta Saulter, an alleged co-conspirator.

Apart from Brooks' testimony, there was no evidence presented at trial by the government that Brown actually purchased or distributed heroin, cocaine, or any other controlled substance. Also, the evidence disclosed that the drug agents monitoring the wiretap at no time notified surveillance following any telephone conversation involving Brown. Brown did not testify.

With respect to the substantive charge against Brown for violation of 21 U.S.C. §843(b), the indictment alleges that Brown and Thompson engaged in a telephone conversation at 1:13 a.m. on February 14, 1977 wherein they discussed, in substance, the sale of cocaine by Thompson to Brown in violation of the statute. The specific telephone call referred to was introduced by the government as Call No. B-418, and a tape of that conversation was played to the jury. In that conversation Brown states that she wants to come by "and pick up some of those dresses." Thompson apparently consents and the call concludes with Brown stating "I'll see you in a minute." There was no evidence introduced by the government to show that Brown thereafter went to Thompson's house to take delivery of cocaine or any other narcotics. There was no evidence that surveil-

[2]The indictment charges a conspiracy occurring from on or about January 1, 1977 until February 22, 1977. (R.Vol. 1, p. 13).

lance was notified on the occasion of that conversation, or that Brown was observed at any time at Thompson's house (except for the Brooks testimony — which would not relate to the occurrences of February 14.)

The Rulings Below

Brown moved for a judgment of acquittal on the conspiracy and substantive charges at the conclusion of the government's evidence and again at the conclusion of all of the evidence. The district court overruled Brown's motions. The jury returned a verdict against Brown, and all other defendants on trial, on all counts. Pursuant to said verdicts, the district court pronounced the following sentence: Brown was committed on Count I (21 U.S.C. §846) to the custody of the Attorney General for imprisonment for a period of four years, with a special parole term of five years to commence at the expiration of the initial sentence. On Count XV (the substantive charge) she was committed to the custody of Attorney General for imprisonment for a period of three years to run concurrently with the sentence imposed in Count I (Appendix "A," *infra.*, p. 27a.

Upon appeal to the United States Court of Appeals for the Tenth Circuit, the judgment of the district court was affirmed, with Circuit Judge McKay dissenting (Appendix "A," *infra.*, p. 1a). The petition for rehearing and suggestion for rehearing in banc was denied, with Circuit Judge McKay voting to grant rehearing in banc.

REASONS FOR GRANTING WRIT

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT WHICH PETITIONER SEEKS TO HAVE THIS COURT REVIEW BY CERTIORARI IS IN CONFLICT WITH DECISION OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEALS.

The issue presented by this Petition, and the reasons compelling certiorari, are succintly stated by Circuit Judge McKay in the dissenting opinion:

> "One does not have to have any sympathy for drug dealers to express a deep concern about the erosion of fundamental doctrines of liberty when that erosion occurs in cases dealing with drug dealers. This case represents one more example of the continuing erosion of the concept that '[g]uilt with us remains individual and personal, even as respects conspiracies. It is not a matter of mass application.' *Kotteakos v. United States,* 328 U.S. 750, 772 (1946).
>
> * * *
>
> In this case all that the evidence shows is that one Thompson was a major drug dealer in Tulsa, Oklahoma, and that these defendants obtained their supplies (apparently for resale) from him. If we take seriously our stated standard that criminal cases must be proved beyond a reasonable doubt, I do not believe that this record supports a finding that these customers of one dealer were connected together in a common conspiracy. What is missing is the 'rim of the wheel to enclose the spokes' of a conspiracy. *See Kotteakos v. United States*, 328 U.S. at 755. Even more alarming is the absence of any evidence under either a civil or criminal standard of proof which would show that these defendants were knowingly involved by agreement with James Anderson — Thompson's California supplier. The majority in this case makes that leap by further enshrining in the criminal law what is essentially the 'affecting commerce' rationale of *Wickard v. Filburn*, 317 U.S. 111 (1942).
>
> It is obvious why some prosecutors, with our aid and comfort, are enamored of bringing allegations of mass conspiracy. No matter how thin the proof as to indi-

vidual defendants, once the jury has looked at the sheer numbers involved and has been shocked by the extensive evidence of criminal activity by a remote actor, the chance that they will pay serious attention to the absence of substantial proof as to one individual is not particularly great. A doctrine which permits this impairs liberty.

To avoid the obvious prejudice attending a mass trial, we ought to return to the principles enunciated in *Kotteakos* and *United States v. Butler*, 494 F.2d 1246 (10th Cir. 1974). Although it may represent some inconvenience to the government, my position here would not prevent the government from legitimately prosecuting those who were in fact guilty. In any event, mere inconvenience to the government has never been an adequate justification for the erosion of principles governing fair trial. *See Kotteakos v. United States*, 328 U.S. at 773." (Appendix "A," *infra.*, pp. 24a-25a).

In *Kotteakos* the district court was of the opinion that the conspiracy charged therein (to violate the provisions of the National Housing Act) was established by proof that each defendant was linked to the central figure of the conspiracy in one or more transactions and that it was therefore possible on the evidence for the jury to conclude that all were in a common venture. 328 U.S. 750, 768-769. The Supreme Court rejected the district court's theory of conspiracy, stating the now oft' cited proposition that proof of a single conspiracy requires proof of the existence of a "rim of the wheel to enclose the spokes" of the conspiracy. (*Id.* at 755)

The crux of the decision of the Court of Appeals in the instant case is stated at page 18 of the opinion (Appendix "A," *infra.*, p. 14a:

"We have discussed the evidence in detail earlier. It

suffices to note that it demonstrated that Anderson supplied drugs from California to Thompson, the Tulsa wholesaler, who distributed them to the various street dealers, including these three appellants. From evidence of the volume and nature of their operations an inference may be drawn of awareness by appellants of the scope of the narcotics conspiracy.

Where large quantities of narcotics are being distributed, each major buyer may be presumed to know that he is part of a wide-ranging venture, the success of which depends on performance by others whose identity he may not even know. *United States v. Heath*, 580 F.2d 1011, 1022 (10th Cir.)"

The conceptual problem with the Court of Appeals analysis and the direct conflict with *Kotteakos* are clear. The court first finds the distribution of "large quantities of narcotics," and utilizes that finding as a predicate to attribute a certain "presumption" to each "major buyer." There is no discussion of any evidence which would show a conspiratorial agreement between Brown and Anderson, or with any other alleged co-conspirator apart from Thompson — nevertheless, the critical conclusion of knowing participation in a single conspiracy obtains.

The lower court's decision is premised upon the following deductive process which is patently inconsistent with the requirements of *Kotteakos*, to-wit: (i) proof that each defendant purchased narcotics from a single supplier; (ii) proof of a significant volume of narcotics in the overall drug operation (including narcotics possessed by a co-conspirator, not linked by the evidence to the defendants; (*See*, Dissenting Opinion, footnote 2); (iii) the linkage of items (1) and (2) above to support the "major buyer" proposition and the attendant presumption of knowledge of the overall conspiracy (Appendix "A," *infra.*, p. 14a); and (4)

the resultant existence of a "common" narcotics scheme. (Appendix "A," *infra.*, p. 14a).

The standard for determining the existence of a single conspiracy is whether there was one overall agreement among the parties to perform various functions in order to carry out the objectives of the conspiracy. *United States v. Hobson*, 519 F.2d 765, 775 (9th Cir. 1975), *cert. denied*, 423 U.S. 931, 96 S.Ct. 283, 46 L.Ed.2d 261. As Circuit Judge McKay noted in his dissent, the present case, like *Kotteakos*, involves substantial evidence of individual conspiracies between each defendant, including Brown, and the supplier Thompson. Evidence was also presented of a conspiracy between Thompson and Anderson. (Appendix "A," *infra.*, p. 50). Thus, while the evidence presented at trial may have been adequate to demonstrate the existence of multiple conspiracies, the evidence was woefully inadequate to demonstrate the existence of an overall scheme involving the central defendants Thompson, Brooks and Anderson with the other named defendants.[3]

The problem with the indictment and proof in this case is not new in federal narcotics prosecutions. Judge Timbers, in *United States v. Sperling*, 506 F.2d 1323 (2d Cir. 1974), issued an admonition to the United States Attorneys' Office in that case — which is directly applicable here:

> "In view of the frequency with which the single conspiracy vs. multiple conspiracies claim is being raised on appeals before this Court, (citations omitted) we take this occasion to caution the government with respect to future prosecutions that it may be unnecessarily exposing itself to reversal by continuing the indictment format as reflected in this case . . . [i]t has become all too common for the government to bring indictments against a dozen or more defendants and endeavor to force as many of them as possible to trial in the same proceeding on the claim of a single conspiracy when the criminal acts could be more reasonably regarded as two or more conspiracies, perhaps with a link at the top." 506 F.2d at 1340-41.

[3]At trial Brown requested an instruction to the jury indicating that under the evidence it was permissible to find the existence of more than one conspiracy, even though a single conspiracy was alleged. The proposed instruction utilized the format provided in Devitt & Blackmar, *Federal Jury Practice & Instructions* (3rd Ed. 1977), §27.16. Such a curative instruction was suggested in *United States v. Butler*, 494 F.2d 1246, 1256 (10th Cir. 1974).

Following *Sperling*, the Second Circuit in *United States v. Bertolotti*, 529 F.2D 149 (2d Cir. 1975), reversed the convictions obtained in the trial court for conspiracy to possess and distribute controlled substances on the grounds that the convictions were obtained on the theory that all defendants were members of a single conspiracy when in fact the proof disclosed multiple conspiracies. Under such circumstances, the error of variance was committed. (*Id.*, p. 154; *Berger v. United States*, 295 U.S. 78, S.Ct. 629, 79 L.Ed. 1314 (1935). The *Bertolotti* court noted that the existence of multiple groups within an alleged conspiracy may be considered as part of one integrated loose-knit combination in instances where there exists a mutual dependence and assistance among the spheres, a common aim or purpose among the participants, or a permissible inference, from the nature and scope of the operation, that each actor was aware of his part in a larger organization where others performed similar roles equally important to the success of the venture. *United States v. Bertolotti*, 529 F.2d at 154. Without detailing specific evidence presented in *Bertolotti*, it should be noted in that case that the indictment included twenty-nine defendants and additional unindicted co-conspirators. The proof showed four major narcotics transactions with the defendants Rossi and Coraluzzo as principal participants in all

transactions. Other alleged co-conspirators participated in various ways in each transaction. The court found that the only common factor linking the transaction was the presence of Rossi and Coraluzzo, which was not a sufficient nexus for conspiracy. *Kotteakos v. United States*, 328 U.S. 750, 773-774, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). There was no evidence to show that Rossi and Coraluzzo were conducting what could be seriously called a regular business on a steady basis, and the scope of the operation was defined only by Rossi's resourcefulness in devising new methods to make money. *United States v. Bertolotti*, 529 F.2d at 155.

The lower court, in affirming the conviction of Brown on the conspiracy court, places substantial reliance upon the testimony of Brooks, the unindicted co-conspirator who attempted to provide evidence against defendants to curry prosecutorial favor. The majority opinion cites Brooks' claim that all defendants were "sellers," that she would refer customers to defendants, that defendants "all know each other," and that Brown "knew the California supplier Anderson." (Appendix "A," *infra.*, p. 00). However, the court in its analysis apparently overlooked the fact that Brooks did not recall when the transactions in "dope" (either heroin or cocaine according to Brooks) occurred, nor did she recall whether Brown ever received any drugs as a result of any communication with Thompson. Brooks was unable to recall the period of time during which the alleged purchases by Brown occurred. It is clear that Brooks' claim that defendants were acquainted with one another, and that Brown "knew" Anderson is insufficient as a matter of law to prove participation in a criminal conspiracy. *United States v. Sanchez*, 508 F.2d 388, 393 (5th Cir. 1975); *United States v. Falcone,* 311 U.S. 205, 210 61 S.Ct. 204, 207, 85 L.Ed. 128, 132 (1940).

The analysis of the lower court is wholly inconsistent

with the law of conspiracy as stated in *Kotteakos* and those federal courts which have adhered to that doctrine. Certiorari should be granted to resolve this departure from established precedent.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 77-1575, 77-1576, 77-1577

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

EARL WATSON, TONY MAXWELL
and MAE LILLIAN BROWN,
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA
(D.C. No. 77-CR-42)

Joel L. Wohlgemuth, of Prichard, Norman, Reed & Wohlgemuth, Tulsa, Oklahoma, for Defendants-Appellants.

Kenneth P. Snoke, Assistant United States Attorney, Tulsa, Oklahoma, (Hubert H. Bryant, United States Attorney, Tulsa, Oklahoma, on the brief) for Plaintiff-Appellee.

Before HOLLOWAY and McKAY, Circuit Judges, and STANLEY, District Judge.*

HOLLOWAY, Circuit Judge

*The Honorable Arthur J. Stanley, Jr. of the District of Kansas, sitting by designation.

Defendants-appellants Watson, Maxwell, and Brown have taken these timely direct appeals from convictions under 21 U.S.C. §846, conspiracy to commit offenses de-

fined in 21 U.S.C. §841(a)(1),[1] (distributing or possessing with intent to distribute, etc., a controlled substance) and in 21 U.S.C. §843(b), (use of a communication facility to facilitate the commission of offenses defined in 21 U.S.C. §841(a)(1))[2] and from convictions of each appellant of a substantive offense under §843(b) of such use of a telephone. Appellants' major contentions are that tape recordings of intercepted telephone conversations and transcripts thereof were improperly permitted to be used against them, that there was insufficient proof to support their convictions, and that there was, in any event, no single conspiracy proved as charged. Several other arguments are also made, and we will discuss all those having some substance.

The indictment charged fifteen individuals, including appellants, with conspiracy knowingly and intentionally to possess with intent to distribute and to distribute heroin

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[1]21 U.S.C. §841(a)(1) provides:

> (a) except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; . . .

Controlled substances are regulated by the Attorney General under the authority vested in him by 21 U.S.C. §§811-812. They include substances such as heroin, cocaine, and marihuana. See 21 U.S.C. §812(c).

[2]On the conspiracy count, appellant Watson was committed to the custody of the Attorney General for five years to be followed by a special parole term of five years; he also received a concurrent four-year sentence on the substantive count. Appellant Maxwell received a ten-year sentence to be followed with a special five-year parole term on the conspiracy count and a concurrent, four-year sentence on the substantive count. The court found that appellant Brown would not benefit from the provisions of the Federal Youth Corrections Act, 18 U.S.C. §§5005-5026, as applied to young adult offenders, see 18 U.S.C. §4216, and sentenced her to four years to be followed by a five-year special parole term on the conspiracy count. She received a concurrent, three-year sentence on the substantive count.

and cocaine, and to use a telephone to facilitate commission of such offenses. In addition, appellants were each charged with one count of knowingly and intentionally using a communications facility, *i.e.*, a telephone, to facilitate the accomplishment of and to accomplish the possession with intent to distribute and the distribution of heroin and cocaine. The conspiracy involved a California supplier, "Pete" Anderson, a Tulsa wholesaler, John Thompson, assisted by one Karen Brooks, and several retailers or street dealers, including appellants Watson, Maxwell, and Brown.

Appellants claim there was insufficient evidence in this case to support their convictions. Viewing all the evidence, togther with all reasonable inferences therefrom, in the light most favorable to the government, as we must, Glasser v. United States, 315 U.S. 60, 80; United States v. Krohn, 573 F.2d 1382, 1385 (10th Cir.), *cert. denied sub nomine* Hahn v. United States, 436 U.S. 949; United States v. Twilligear, 460 F.2d 79, 81-82 (10th Cir.), we must disagree with this contention. Yet, since appellants have challenged the admission in evidence of certain tape recordings of telephone intercepts, and since without those recordings the evidence might not support the adverse jury verdicts rendered, we turn first to a consideration of the various issues involving the use of those tapes.

Appellants Brown and Watson strenuously argue that there was error in not suppressing tape recordings of certain intercepted telephone communications, in not suppressing transcripts of certain intercepted phone communications, and in permitting transcripts of the tape recordings of the telephone conversations to be used by the jurors.[2a]

[2a]These contentions are urged in propositions II, III, IV and V of the Brief for the Appellants, respectively claims of error in denying appellant Brown's motion to suppress tape recordings of certain intercepted

(continued next page)

The admission of tape recordings in evidence is subject to the rules of evidence generally. This means that a proper foundation must be laid for their admission, and that they must be relevant and not privileged. In addition, the Federal Rules of Evidence provide that the original tape recordings be used, if possible,[3] Rule 1002, and that when telephone conversations are involved, evidence be offered as to the correct telephone number, Rule 901(b)(6).[4] Appellants here make several specific challenges to the foundation laid for playing of the tapes which we will consider.

First, appellant Brown argues that there was improper and inadequate identification of the speakers on certain tapes for which agent Bell provided the voice identification. This challenge is based on the claim that agent Bell did not have sufficient opportunity to become acquainted with appellant Brown's voice in order to authenticate tapes introduced at trial. Furthermore, it is claimed that agent Bell's familiarity with Brown's voice was developed after the conversations in question transpired.

Rule 901(b)(5), F.R.E., provides one example of acceptable voice identification as follows:

> (5) Voice identification. Identification of voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice *at any time* under circumstances connecting it with the alleged speaker. (emphasis added).

As the Rule plainly says, familiarity with another's voice may be acquired either before or after the particular speaking which is the subject of the identification. United States v. Kirk, 534 F.2d 1262, 1277 (8th Cir.), *cert. denied*, 433 U.S. 907. Thus, the fact that Bell did not speak with appellant Brown until after the date of the telephone intercept did not prevent him from authenticating Brown's voice on tape introduced at trial. See, *e.g.*, United States v. Cox, 449 F.2d 679 (10th Cir.), *cert. denied*, 406 U.S. 934. Furthermore, we find that the record reflects that Bell had ample time in which to become acquainted with Brown's voice. He had face-to-face conversations with her on three occasions, and one of these conversations extended over half an hour. (II R. 216-17; IV R. 440). Any doubts about Bell's powers of recall were properly questions for the jury to determine. See United States v. Vento, 533 F.2d 838, 865 (3d Cir.); United States v. Rizzo, 492 F.2d 443, 448 (2d Cir.), *cert. denied*, 417 U.S. 944. We reject appellant Brown's argument based on United States v. McKeever, 169 F.Supp. 426 (S.D.N.Y.), *rev'd on other grounds*, 271 F.2d 669 (2d Cir.), that the court improperly gave the authentication question the jury. The trial judge properly took evidence on the threshold question whether Bell had *any* basis for identifying the voice and then left all questions of weight and credibility for the jury.

Second, all appellants challenge the use of the tapes on the ground of unintelligibility. Where a tape recording is objected to as unintelligible or inaudible, its admissibility is within the sound discretion of the trial judge. United States v. Brinkelow, 560 F.2d 1008, 1011 (10th Cir.); United States v. Jones, 540 F.2d 465, 470 (10th Cir.), *cert. denied*, 429 U.S. 1101; United States v. Hodges, 480 F.2d

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wire communications for lack of intelligibility, in denying without a hearing Watson's motion to suppress tape recordings of certain intercepted wire communications for lack of intelligibility, in determining that the government introduced evidence sufficient to authenticate tape recordings of certain wire communications involving appellant Brown, and in denying appellant Brown's motion to suppress transcripts of certain tape recordings of certain intercepted wire communications.

[3]The government used original tapes in this case.

[4]The record contains such evidence at III R. 267-68.

229, 233-34 (10th Cir.). Unless the unintelligible portions are so substantial as to render the recording as a whole untrustworthy, it may be admitted. United States v. Jones *supra*, 540 F.2d at 470. The trail judge held a pre-trial hearing[5] at which he considered the issue of intelligibility and exercised his discretion on this issue. From our independent hearing of the tapes we conclude that there was no abuse of the trial court's discretion and no substantial unintelligibility productive of untrustworthiness.

Third, appellants argue that it was prejudicial error to provide the jury with transcripts of the tapes during the playing of the tapes. See generally United States v. Gerry, 515 F.2d 130, 143-44 (2d Cir.), *cert. denied*, 423 U.S.832 (use of transcripts upheld because trial judge had difficulty understanding them). Proof was offered of accuracy of the transcripts at a pre-trial hearing[6] and the court permitted their use during the playing of the tapes to permit clear identification of the voices.[7] The trail judge, however, did not admit the transcripts in evidence. Instead he gave a

[5]Appellant Watson contends that his motion to suppress should have been heard at this hearing along with those of his co-defendants and that it was an abuse of discretion and a violation of due process for the trial court to deny his motion to suppress on the ground that it was untimely filed. We disagree and find no abuse of discretion in the ruling.

[6]A judicial determination of the accuracy of transcripts is not a *sine qua non* of their use, see United States v. Onori, 535 F.2d 938, 948 (5th Cir.), but is a recommended practice in the absence of a stipulation by counsel on the point, *cf.* United States v. Rochan, 563 F.2d 1246, 1250-52 (5th Cir.) (accuracy a question of authentication).

[7]See United States v. McMillan, 508 F.2d 101, 105 (8th Cir.), *cert. denied*, 421 U.S. 916. Use of transcripts here is not for purposes of establishing that a particular voice belongs to a particular person, but so that the jury may understand which voice the prosecution wants the jury to believe belongs to a particular person. See *e.g.*, II R. 225-26. In this case the prosecution introduced oral testimony identifying the voices on all tapes.

limiting instruction, which he repeated several times during the trial, instructing the jury to use the transcripts only to assist them in listening to the tapes and not to consider the transcripts as evidence. In the sound discretion of the trial judge, which was properly exercised here, such limited use of transcripts is permissible. See United States v. John, 508 F.2d 1134, 1141 (8th Cir.), *cert. denied*, 421 U.S. 962; United States v. McMillan, 508 F.2d 101, 105 (8th Cir.), *cert. denied*, 421 U.S. 916.

We have considered all the contentions regarding the playing of the tapes and the use of the transcripts and are satisfied there was no reversible error. Our hearing of the tapes persuades us that they are substantially accurate and intelligible and that the transcripts are substantially accurate as well. Therefore, with respect to the rights of these three appellants there was no prejudicial error and no abuse of discretion by the trial court in the procedure followed regarding the tapes and the transcripts.[8]

With respect to their convictions under 21 U.S.C. §846, all three appellants argue that the evidence was in-

[8]We have noted heretofore that Rule 104(a) of the Federal Rules of Evidence places a responsibility on the trial judge for determining preliminary questions as to the admissibility of statements of a coconspirator. Such statements are not hearsay and are admissible if there is substantial, independent, non-hearsay evidence demonstrating the existence of a conspiracy involving the speaker and the defendant. See United States v. Andrews, 585 F.2d 961, 965-66 (10th Cir.); United States v. Bell, 573, F.2d 1040, 1043-44 (8th Cir.).

As the *Bell* case points out, such a determination on the admissibility of an alleged coconspirator's statement is now a preliminary question for the judge, not the jury, to decide under Rule 104. United States v. Bell, *supra*, 573 F.2d at 1043. However, as our *Andrews* opinion says, evidence of the acts and statements of coconspirators may be admitted prior to proof demonstrating participation in the conspiratorial scheme by the objecting defendant, provided the foundation is subsequently laid. 585 F.2d at 966; see United States v. Bell, *supra*, 573 F.2d at 1044. No question on this procedure is raised by these appellants.

sufficient to support their convictions. More specifically, appellants contend that the evidence fell far short of proof beyond a reasonable doubt that each of them had the deliberate, knowing and specific intent to join the conspiracy charged; and that, while viewed in the light most favorable to the government the evidence showed several telephone conversations with Thompson, that proof alone was insufficient to connect appellants with the conspiracy charged. (Brief for the Appellants, Proposition VI, pp. 31, 37-38).

The basic rule for insufficiency of the evidence to sustain a conviction challenged on appeal is stated by Judge Hill in United States v. Twilligear, 460 F.2d 79, 81-82 (10th Cir.):

> This court is bound to view the evidence presented in the trail court in the light most favorable to the government to ascertain if there is sufficient substantial proof, direct and circumstantial, together with reasonable inferences to be drawn therefrom, from which a jury might find a defendant guilty beyond a reasonable doubt.

Of course, guilt is individual and personal, even as regards conspiracies, and is not a matter of mass application. United States v. Butler, 494 F.2d 1246, 1256 (10th Cir.). And we agree that proof of the existence of a buyer-seller relationship, without more, is inadequate to tie the buyer to a larger conspiracy such as is charged here. See United States v. Torres, 503 F.2d 1120, 1123 (2d Cir.); United States v. Sperling, 506 F.2d 1323, 1342 (2d Cir.), *cert. denied*, 431 U.S. 918. Moreover for a single act to be sufficient to draw an actor within the ambit of a conspiracy to violate the narcotics laws, there must be independent evidence tending to prove that the defendant had some knowledge of the broader conspiracy, or the single act must be one from which such knowledge may be inferred. United States v. Sperling, *supra*, 506 F.2d at 1342. For the

inference of intent to join a conspiracy to be made from proof of a single act, it must be such as to show the actor's knowledge of the existence and scope of the conspiracy, and his belief that the benefit to be derived from his actions depends on the success of the acts of others. United States v. Perry, 550 F.2d 524, 529 (9th Cir.).

A primary government witness was Karen Brooks, an indicted coconspirator. She had waived a jury and was awaiting trial and cooperated with the government in giving her testimony. On cross-examination she stated that it was her understanding that the charges might be dismissed against her or that she might receive probation if she testified. She said this was what her attorney hoped would happen. If she had not had that impression, she admitted she probably would not have testified against the defendants. (III R. 310-315).

Brooks testified that she had known John Hubert Thompson ("J.T."), the Tulsa wholesaler in this drug operation, for nine months. She distributed heroin and cocaine for him and had a telephone installed at his residence in her name. When business was good, Brooks would normally sell "pretty close" to $2,000 worth of heroin and cocaine in a day in quantities priced at $50. (Id. at 289). She worked as a street dealer, turning over the bulk of her proceeds to Thompson, but when he was away she would handle larger transactions for him. She testified that she knew "Pete" Anderson, the California supplier, and that Thompson got his "dope" through Anderson. (Id. at 303). She referred to various street dealers in her testimony, including all three of the appellants.

Brooks testified that she knew Watson and could identify him; that she had been present when Thompson sold heroin to Watson; that she had delivered heroin to Watson for Thompson and that once Watson told her he had several people waiting in the car for "dope." She knew Wat-

son was a user of drugs himself. Brooks further testified that she knew Maxwell; that if she ran out of heroin or cocaine, she would refer her customers to him; that she sold heroin to Maxwell when Thompson was away; and that Maxwell distributed drugs. Brooks also testified that she knew appellant Brown, who was known as "Chi Chi"; that Brown was a seller; that when Brooks ran out of drugs she would refer customers to appellant Brown; that Brooks was present when Brown brought heroin from Thompson; and that Brown bought heroin from Thompson; and that Brown knew the California supplier Anderson. Brooks further said all three defendants knew each other. (III R. 285-299).

In addition to the testimony of Karen Brooks, there was government evidence concerning telephone calls involving all three appellants. For reasons already stated, we have held that there was no error in permitting the playing of tapes of these calls and the use of transcripts relating to them. This evidence included the following:

As to Watson there was evidence of 13 telephone calls occurring between February 10 and February 13, 1977. Eight of these were identified as calls between Watson and Thompson which occurred on February 12. In the first call at 1:23 a.m., Watson ordered "300" [dollars] of "dog," identified as heroin. (I R. 181-82; III R. 273; IV R. 478-81, 512). Three hundred dollars would have purchased a quarter ounce from Thompson. Thompson invited Watson to come to his house for delivery. At about 1:45 a.m., surveillance officers saw an orange Vega arrive at Thompson's house, where a passenger got out and entered the house. In a second call at 11:32 a.m. that day, Watson ordered another $100 worth of heroin, to be delivered at a Bestyet market. Later surveillance officers saw Watson exit the same Vega and meet with Thompson at a Bestyet market in Tulsa, and a hand-to-hand exchange between Watson and Thompson occurred. (IV R. 488-92).

At 10:02 p.m. on February 12, Watson arranged a purchase and pick-up of heroin and cocaine, telling Thompson where he was. Surveillance officers observed Thompson leave his house at 10:16 p.m. He met Watson at a laundromat where Watson walked to Thompson's van, and leaned on the driver's window of the van.[9] Watson returned to the other car and drove off with another occupant, Mark Allen Hart. Officers stopped them a few blocks away and found that Hart possessed heroin.

As to Maxwell, the testimony of Karen Brooks was supplemented with the playing of tapes of telephone conversations with Thompson. Nine calls between Maxwell and Thompson, all of which occurred during a four-day period from February 11 through February 14, 1977, were introduced. For example, at 12:46 p.m., on February 12 Maxwell inquired about an "oz" for "15," an ounce of drugs for $1,500. (III R. 275). At 6:05 p.m. that day Maxwell ordered "a quarter or two of 'that girl'," identified as cocaine. (Id. at 272).[10] Also at 9:38 p.m., on February 12, Maxwell told Thompson that he had "some people visiting" and that "they wanted one of those quarter things of girl." Thompson told Maxwell that he could come over and get a quarter. In a call on the night of February 14, after Thompson asked if he knew someone who wanted "a quarter of dog" (quarter ounce of heroin), Maxwell said "Yeh." (I R. 236). Later that night arrangements were made during a call that Maxwell would meet Thompson at the Blue Goose. Thompson was followed thereafter from his house to the Blue Goose Club, where he met with a black male in a vehicle. (III R. 414-16).

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[9]Such circumstantial evidence may indicate a delivery of drugs. See United States v. Baldarrama, 566 F.2d 560, 565 (5th Cir.).

[10]The repeated use of cryptic expressions by members of a narcotics conspiracy has been described as a "narcotics code." United States v. Manfredi, 488 F.2d 588, 597 (2d Cir.), *cert. denied*, 417 U.S. 936.

As to Brown, the government also introduced proof of numerous calls, most of them occurring on February 13 and 14, 1977. For example at 11:04 a.m., on February 11, Thompson referred another alleged coconspirator, Alfred Ray Jennings (Fred), to "Chi Chi" for "some girl." Several calls concerned an offer by appellant Brown to trade a black suede and mink coat for drugs. At 4:47 p.m. on February 13, during one call Thompson referred a customer who identified herself as "Carol" to Brown. At 5:12 p.m. that same day Brown asked Thompson if she could come by his residence and pick up "number 1 dresses," identified as quantities of cocaine. (III R. 272-75; IV R. 445-46). Again at 1:13 a.m., on February 14 Brown asked permission to come by Thompson's house to pick up "some of those dresses." (III R. 273). At 2:44 a.m., on February 14 Brown asked Thompson if she could come by "again" for "one of those 50's till in the morning." (I R. 230; IV R. 447-51).

There are vigorous arguments made that the testimony of Karen Brooks was unbelievable and unreliable; that the evidence showed only purchases of drugs for the use of appellants themselves, as Watson testified; and, of course, that the recordings were unintelligible and inadmissible. We have already rejected the latter contentions about the tapes and transcripts. With regard to the former contentions, evaluating the credibility of witnesses is a matter for the jury and not an appellate court. United States v. Twilligear, *supra,* 460 F.2d at 82. Essentially the question is whether there was sufficient circumstantial evidence, along with the direct testimony of Karen Brooks, to support the conspiracy convictions. Conspiracy may be proved by circumstantial evidence. See Glasser v. United States, 315 U.S. 60, 80; United States v. Gamble, 541 F.2d 873, 877 (10th Cir.). Viewing the evidence in the light most favorable to the government, we are satisfied that the existence of the conspiracy, and the knowing and

intentional joining in it by the appellants, was sufficiently demonstrated by the evidence to sustain the jury's verdicts. United States v. Twilligear, *supra,* 460 F.2d at 81-82.

III

As discussed earlier, all appellants strenuously argue that the government's evidence was insufficient to establish that any of them became members of the conspiracy as charged in the indictment. They also say that even if the proof was adequate to link each or any of them to conspiratorial conduct, which they all deny, there was nevertheless a variance between the single conspiracy charged and the several discrete conspiracies which may have been proven by the evidence. They contend that the evidence was woefully inadequate to link the appellants to the overall scheme involving defendants Thompson, Brooks, Anderson and Carlett Jones. (Brief for the Appellants, 58-59). Furthermore, the existence of this variance requires reversal because of the severe prejudice created by the spill-over effect attendant on defendants' trial under a single conspiracy charge. Error is also claimed because of refusal to give appellant Brown's requested instruction on the existence of separate conspiracies.

Appellants rely, *inter alia,* on Kotteakos v. United States, 328 U.S. 750; United States v. Bertolotti, 529 F.2d 149 (2d Cir.); and United States v. Sperling, 506 F.2d 1323 (2d Cir.). Special emphasis is placed on the *Bertolotti* opinion which reversed convictions where the court found that the proof showed at least four separate conspiracies instead of the one overall conspiracy charged, where the types of conspiracies concerned various "rip-offs" and crimes which "scarcely resembled one another," United States v. Bertolotti, *supra,* 529 F.2d at 157, and where inflammatory discussions about kidnappings, guns and narcotics were all brought before the jury. We must agree that where such prejudice and separate, identifiable con-

spiracies are involved a reversal is required, see United States v. Butler, 494 F.2d 1246, 1255-57; but we feel that is not the case here.

We have discussed the evidence in detail earlier. It suffices to note here that it demonstrated that Anderson supplied drugs from California to Thompson, the Tulsa wholesaler, who distributed them to various street dealers, including these three appellants. From evidence of the volume and nature of their operations, an inference may be drawn of awareness by appellants of the scope of the narcotics conspiracy.

Where large quantities of narcotics are being distributed, each major buyer may be presumed to know that he is part of a wide-ranging venture, the success of which depends on performance by others whose identity he may not even know. United States v. Heath, 580 F.2d 1011, 1022 (10th Cir.). We are satisfied that the evidence here shows a common design to acquire and distribute heroin and cocaine, id. at 1022, and that it was permissible to link the appellants with Thompson and Anderson. Whether the evidence was sufficient to establish the single conspiracy charge [1] was a question for the jury. Id. at 1022; United States v. Ricco, 549 F.2d 264, 268 (2d Cir.), *cert. denied*, 431 U.S. 905. The trial court thoroughly and properly instructed the jury on the government's burden of proving the conspiracy charged beyond a reasonable doubt.

[1]The conspiracy charged by count one of the indictment was an unlawful conspiracy to knowingly and intentionally possess with intent to distribute and to distribute heroin and cocaine, and to knowingly and intentionally use telephones in committing, causing and facilitating the commission of possession with intent to distribute, and the distribution of controlled substances. The indictment outlined the method used by the conspiracy including procurement by Thompson of heroin and cocaine from Anderson, and dilution and repackaging in smaller quantities by Thompson for resale to others. The allegations of overt acts included in the indictment described the involvement of appellants as sellers whose source was Thompson.

We are satisfied that the record as a whole supports the jury's verdicts of guilt of the conspiracy charged.

As noted, appellant Brown makes the related argument that the trial court committed prejudicial error in not giving her requested instruction on multiple conspiracies. We do not agree. We feel that the instructions as a whole adequately covered the question since the trial court clearly charged that the government had the burden of proving beyond a reasonable doubt the conspiracy as alleged, and that the evidence should be considered separately as to each individual defendant. (V R. 819-23, 832). In these circumstances we feel that it was not error to refuse the requested instruction concerning multiple conspiracies. See United States v. Russo, 527 F.2d 1051, 1059 (10th Cir.), *cert. denied,* 426 U.S. 906; United States v. Lam Lek Chong, 544 F.2d 58, 67-68 (2d Cir.), *cert. denied sub nom.* Leganoza v. United States, 429 U.S. 1101; United States v. Hobson, 519 F.2d 765, 775 (9th Cir.), *cert. denied,* 423 U.S. 931; United States v. Salerno, 485 F.2d 260, 263 (3d Cir.), *cert. denied,* 415 U.S. 994. Thus we are convinced there was no error in refusing the requested instruction.

The appellants argue that the indictment was insufficient in its allegations of conspiracy. First we will consider the contention that the trial court erred in denying appellant Brown's motion to dismiss the indictment for failure to state facts essential to constitute a conspiracy under 21 U.S.C. §846. More specifically, appellant Brown says that she is not identified within the portion of the indictment describing the objects of the conspiracy, that clearly the main figures of the conspiracy were Thompson, Anderson and Brooks, and that the only allegations involving her appear in the listing of overt acts (paragraphs 11, 12 and 49), which contains no statement that she purchased, sold or distributed narcotics or that she assisted Thompson,

Anderson, Brooks or Carlett Jones in the performance of functions necessary to the continuation or success of the scheme. (Brief for the Appellants, 17-21).

Count 1 of the indictment alleges a conspiracy from on or about January 1 until on or about February 22, 1977, within the Northern District of Oklahoma, and elsewhere, charging that the 15 named defendants, all specified and including "MAE LILLIAN BROWN, a/k/a 'Chi Chi'," did knowingly, willfully and unlawfully combine and conspire to knowingly and intentionally possess with intent to distribute and to distribute heroin and cocaine, controlled substances, and to knowingly and intentionally use a telephone in committing, causing commission of and facilitating the commission of possession with intent to distribute and distribution of narcotic drugs.

Further the indictment alleges that the objects of the conspiracy were to be accomplished, *inter alia,* by Thompson making arrangements to procure heroin and cocaine from Anderson, and then diluting the drugs, repackaging them in smaller quantities, and selling them "to various other co-conspirators," who would dilute and/or repackage the drugs still further and sell them to other customers. The allegations of the overt acts included references to defendant Brown as follows:

> 11. On or about February 11, 1977, at about 11:01 a.m., defendant MAE LILLIAN BROWN, also known as "CHI CHI," had a telephone conversation with unindicted co-conspirator Charles Etta Saulters, in Tulsa, Oklahoma, which, in substance, concerned the trading of a coat for narcotics.
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> 12. On or about February 11, 1977, at about 11:04 a.m., defendant ALFRED RAY JENNINGS had a telephone conversation with defendant JOHN HUBERT THOMPSON, in Tulsa, Oklahoma, which, in substance, concerned the arrangements for delivery

> by THOMPSON of a quantity of cocaine to ALFRED RAY JENNINGS and THOMPSON's prior delivery of cocaine to defendant MAE LILLIAN BROWN also known as "CHI CHI."
>
> 49. On or about February 14, 1977, at about 01:13 a.m., and at about 2:44 a.m., defendant MAE LILLIAN BROWN, also known as "CHI CHI," had a telephone conversation with defendant JOHN HUBERT THOMPSON, in Tulsa, Oklahoma, which, in substance, concerned the arrangements for defendant MAE LILLIAN BROWN to come by defendant THOMPSON's house and take delivery of a quantity of cocaine.

We are satisfied that the conspiracy allegations of the indictment were sufficient as to appellant Brown. A charge of conspiracy is sufficient if it follows the statutory language and contains an adequate statement of an overt act to effectuate the object of the conspiracy, and the requisite overt act need not be criminal in itself. United States v. Sterkel, 430 F.2d 1262, 1263 (10th Cir.). The allegations must be adequate to inform the defendant of the nature of the charge and to serve, together with the record and judgment of conviction, as sufficient protection against possible double jeopardy. Id. at 1263-64. The indictment in the instant case satisfied these requirements, charging the named defendants with conspiring for the particular unlawful purposes alleged. Moreover in the later allegations of overt acts, appellant Brown was clearly alleged to have discussed the trading of narcotics, to have received delivery of cocaine, and to have discussed by telephone arrangements for taking delivery of cocaine. Such allegations in the overt acts may be considered in judging sufficiency of the conspiracy indictment. See United States v. Strauss, 283 F.2d 155, 159 (5th Cir.).[12]

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[12]We have considered the *Strauss* case, which is relied on by appel-

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With respect to the conspiracy charge, we feel that the indictment met the fundamental requirements discussed above, and the constitutional requirement to inform the defendant of the nature and cause of the accusation against her. It also complied with the pleading requirement of a plain, concise and definite written statement of the essential facts constituting the conspiracy offense charged. See United States v. DePugh, 452 F.2d 915, 920; Rule 7(c), F.R.Crim.P. Thus, appellant Brown's challenge to the sufficiency of the conspiracy charge must fail.

The appellants all strenuously argue that the proof was insufficient to sustain their convictions of the substantive offense of violation of 21 U.S.C. §843(b),[13] using the telephone to facilitate the commission of possessing with intent to distribute and distributing controlled substances. They say that the substantive counts (counts IX, X and XV relating respectively to defendants Maxwell,

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Brown, but it is clearly distinguishable. The allegations of combination, conspiracy, etc., there were all directed toward a scheme to defraud creditors, a violation of 18 U.S.C. §152 prohibiting the concealment of assets of a corporation. The additional citation of the mail fraud statute in the indictment was the only actual reference to matter relating to mail fraud, and thus that part of the indictment was held insufficient. That case is wholly unlike the instant indictment, outlined above.

[13]Section 843(b) reads as follows:

Communication facility

(b) It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission or writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication.

Watson and Brown) charged use of the telephone in committing, causing the comission of, and facilitating knowing and intentional possession with intent to distribute *and distribution of controlled substances,* and that there was no proof of any delivery of the substances after the calls. Since the actual offense charged, which included distribution, was not proven, appellants contend there was insufficient proof of violation of §843(b), as was held by United States v. Leslie, 411 F.Supp. 215 (D.Del.); cf. United States v. Rodriguez, 546 F.2d 302, 307-09 (9th Cir.).

There are variations in the facts with respect to each of these three appellants, and the proof was stronger against defendants Watson and Maxwell than it was against defendant Brown.[14] Nevertheless, we are persuaded

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[14]Count X of the indictment alleges that Watson and J.T. "discussed in substance, delivery arrangements for a sale of heroin and cocaine" in a phone conversation occurring at about 9:39 p.m., on February 12, 1977. (I R. 27). The tape of this call from Watson to J.T. was played at trial. The voices on the tape were identified, (IV R. 510-12), and testimony was taken concerning a subsequent meeting between Watson and J.T. (IV R. 516-31). The record shows that shortly thereafter Watson was arrested in the company of Mark Allen Hart, who was found in possession of heroin. (IV R. 546-54). Appellant Watson contends that this testimony is deficient as to him because he was not found in possession of any durgs. Furthermore, he claims the telephone call related only to cocaine, and Hart was found in possession of heroin. Yet, the jury could have found that the call related to both drugs and that after the pickup from Watson, see generally United States v. Baldarrama, 556 F.2d 560, 565 (5th Cir.), he had personally used the cocaine. The evidence is therefore sufficient to show not only that Watson used the telephone to facilitate J.T.'s possession with intent to distribute but also to facilitate his own distribution.

Count IX of the indictment alleges that Maxwell and J.T. "discussed, in substance, the sale of cocaine to Maxwell" in a phone conversation occurring about 9:38 p.m., on February 12, 1977. (I R. 26). The tape of the call was played at trial, and the voices on the tape were identified. (III R. 398-400). Maxwell clearly states that some people are visiting and "They wanted one of those quarter things of girl."

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that the substantive convictions of all these appellants should be upheld on the basis of the position presented by the government to the trial court, and as accepted and spelled out in the discussion of the issue by the trial judge when he overruled the defendants' motions for acquittal. (VR. 690-701).

The theory of the trial judge was essentially that, viewing the evidence favorably to the government, Thompson was a distributor, that he was committing the felony of possession with intent to distribute the controlled substances, that under the *modus operandi* of Thompson the telephone was used to facilitate distribution, and that when defendants used the telephone and contacted

(Quarter ounce of cocaine). J.T. tells Maxwell that he may come get the quarter ounce. (I R. 204). In light of Karen Brook's testimony that J.T. periodically possessed large amounts of heroin and cocaine and that J.T. had her install a phone at his residence in her name (III R. 267, 287, 305), evidence such as that presented here against appellant Maxwell that use was made of that phone line for a drug related conversation amply supports Maxwell's conviction under §843(b) for facilitating J.T.'s possession with intent to distribute.

Count XV of the indictment alleges that Brown and J.T. "discussed, in substance, the sale of cocaine to Brown," in a phone conversation occuring about 1:13 a.m., on February 14, 1977. (I R. 28). The tape of the call was played at trial, and the voices on the tape were identified. (IV R. 443-46). In the conversation Brown identifies herself and inquires whether she may "come by and pick up some of those dresses" (cocaine). (I R. 229). This call followed a call of eight hours earlier concerning a pick-up for "number one dresses," (I R. 228) and it preceded a call a mere hour and a half later in which Brown asked J.T. whether she could come by "again" for "one of those 50's till in the morning." (I R. 230). She also said that in the morning, "tomorrow," she would come get "that quarter." In view of the evidence that Brown made several calls during this period of time; that Thompson held significant quantities of drugs; that he had had a telephone installed; and that Brown used that line in this specific instance for a drug related conversation, we sustain Brown's conviction under §843(b) for facilitating Thompson's possession with intent to distribute.

Thompson, they thus facilitated his unlawful possession with intent to distribute.

We agree, for the telephone, as this record shows, was indeed used to facilitate distribution and to reap the profits which fed the operation. Viewing the evidence favorably to the government, there was proof that the appellants, as street dealers, were using the telephone to obtain heroin or cocaine for resale. Their calls come within the common meaning of facilitate — "to make easier," Webster's New Collegiate Dictionary, p. 410 (1975) — by making easier the commission of the offense of possessing the substances with intent to distribute. The facilitation of that offense of possession is enough. Although the indictment did also allege conjunctively that the calls aided the distribution of the substances as well as possession with intent to distribute, it was sufficient for the government to prove that either the possession or distribution offenses were facilitated. See Turner v. United States, 396 U.S. 398, 420.

United States v. Leslie, 411 F.Supp. 215 (D.Del.), dismissed a case brought under §843(b) where there was a charge of use of the telephone to facilitate distribution of methamphetamine. It was stipulated that the informant in the United States receiving the defendant's calls from Canada had no such substance and that no methamphetamine came into the United States as a result of the calls. The court held that in view of the legislative history and wording of the statute, proof of a mere attempt or conspiracy to commit such a violation was not enough without proof of actual distribution.

We are inclined to agree with the Third Circuit's rejection of the statutory interpretation in *Leslie*. See United States v. Pierorazio, 578 F.2d 48, 51 (3d Cir.), *cert. pending*. In addition, our case is different from *Leslie* because here there *was* evidence of actual possession

with intent to distribute and of circumstances from which it could be inferred that the defendants' calls facilitated that unlawful possession.

For these reasons we uphold the convictions of the appellants for substantive offenses under §843(b).[15]

VI

Lastly, appellants claim prejudicial error in the admission over objections by them, of evidence relating to a seizure of narcotics and other items at the home of coconspirator Anderson in Fresno, California.

Appellants point to the conclusion of the government's case by the introduction of evidence concerning a search of Anderson's home in Fresno and the seizure of a large quantity of heroin and cocaine, forty-nine pounds of lactose, one hundred bricks of mannite and various narcotics paraphernalia including scales, sifters, strainers and spoons. In addition, $16,000 in cash was discovered in a bedroom drawer and another $10,013 between the mattresses.

Objections were made of irrelevancy under Rule 402 and of unfair prejudice outweighing probative value, under Rule 403, F.R.E. Appellants say there was no proof connecting any of them to a conspiracy to import narcotics from California or with Anderson, and that the powerful effect of the evidence on the jury was prejudicial. The argument is renewed that in any event no more than multiple conspiracies were shown, with proof as to any conspiracy

[15]A similar argument is made that since distribution was an essential element for conviction of appellant Brown under §843(b), the indictment was defective in making that charge. She says that the indictment did not allege that she actually took delivery of cocaine and did not imply or suggest that she intended to or did distribute cocaine. For the reasons stated above we must disagree and hold that the substantive charge against defendant Brown in count XV was sufficient as pleaded.

to import narcotics from California being a prejudicial variance from the conspiracy charged.

We dealt with the single-multiple conspiracy issue earlier and concluded that the proof of a conspiracy embracing importation from California was sufficient to go to the jury. We agree that the trial court's ruling that the evidence concerning the items seized at Anderson's California home was relevant to show the existence and scope of the conspiracy. It was conceded by the government that the raid occurred on February 21, 1977 — over a week after the overt acts of February 12 and 14, (I. R. 602-03), which are alleged against these appellants. However, there was evidence that Thompson sent Anderson a suitcase containing $14,000 on February 12. The challenged evidence was therefore relevant to establish Anderson's possession of a large amount of cash, drugs and narcotics paraphernalia within a reasonable time after the appellants' activities, as well as to corroborate the government's testimony on the functioning of the conspiracy.

We cannot agree that the trial judge erred in his ruling that the potential for prejudice did not call for exclusion of the evidence. Rule 403 provides that, although relevant, evidence may be excluded if its probative value is substantially outweighed, *inter alia*, by the danger of unfair prejudice, confusion of the issues, or misleading the jury. This determination is within the sound discretion of the trial judge, United States v. Krohn, *supra*, 573 F.2d at 1389, and we find no abuse of that discretion in this case.

We have considered the remaining arguments of appellants and find them to be without merit and to call for no further discussion. We conclude that no reversible error is demonstrated and accordingly the judgements are

AFFIRMED.

Nos. 77-1575, 77-1576, 77-1577 — UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. EARL WATSON, TONY MAXWELL and MAE LILLIAN BROWN, Defendants-Appellants.

McKAY, dissenting:

One does not have to have any sympathy for drug dealers to express a deep concern about the erosion of fundamental doctrines of liberty when that erosion occurs in cases dealing with drug dealers. This case represents one more example of the continuing erosion of the concept that "[g]uilt with us remains individual and personal, even as respects conspiracies. It is not a matter of mass application." *Kotteakos v. United States*, 328 U.S. 750, 772 (1946). While I have expressed elsewhere in greater detail my concern about the growing tentacles of conspiracy doctrines, *United States v. Heath*, 580 F.2d 1011 (10th Cir. 1978) (McKay, J., dissenting), the Court's analysis in this case compels me to reiterate my apprehensions.

In this case all that the evidence shows is that one Thompson was a major drug dealer in Tulsa, Oklahoma, and that these defendants obtained their supplies (apparently for resale) from him. If we take seriously our stated standard that criminal cases must be proved beyond a reasonable doubt, I do not believe that this record supports a finding that these customers of one dealer were connected together in a common conspiracy. What is missing is the "rim of the wheel to enclose the spokes" of a conspiracy. *See Kotteakos v. United States*, 328 U.S. at 755. Even more alarming is the absence of any evidence under either a civil or criminal standard of proof which would show that these defendants were knowingly involved by agreement with James Anderson — Thompson's California supplier. The agreement in this case makes that leap by further enshrining in the criminal law what is essentially

the "affecting commerce" rationale of *Wickard v. Filburn*, 317 U.S. 111 (1942).[1]

It is obvious why some prosecutors, with our aid and comfort, are enamored of bringing allegations of mass conspiracy. No matter how thin the proof as to individual defendants, once the jury has looked at the sheer numbers involved and has been shocked by the extensive evidence of criminal activity by a remote actor[2] the chance that they will pay serious attention to the absence of substantial proof as to one individual is not particularly great. A doctrine which permits this impairs liberty.

To avoid the obvious prejudice attending a mass trial, we ought to return to the principles enunciated in *Kotteakos* and *United States v. Butler*, 494 F.2d 1246 (10th Cir. 1974). Although it may represent some inconvenience to the government, my position here would not prevent the government from legitimately prosecuting those who were in fact guilty[3] In any event, mere inconvenience to the government has never been an adequate justification for the erosion of principles governing fair trial. *See Kotteakos v. United States*, 328 U.S. at 773.

I would reverse.

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[1]Although not totally without hyperbole, I made this observation earlier in United State v. Heath, 580 F.2d at 1032 (McKay, J., dissenting). Its repetition seems justified here in view of the majority's insistence that the large amount of narcotics distributed gives rise to a presumption of knowing participation in a "wide-ranging venture." It is difficult to imagine how such an analysis can be effectively limited in its scope. The expansiveness of this rationale threatens to render meaningless the very word it seeks to define — "conspiracy."

[2]When one examines the evidence against Anderson set forth on page 27 of the majority opinion, it is clear why the prosecutors wished to have these small fry tried with him even though no evidence at all linked them together in a conspiracy.

[3]As in *Kotteakos*, there was in this case substantial evidence of individual conspiracies between each of these defendants and their supplier, Thompson. There was also evidence of conspiracy between Thompson and Anderson.

APPENDIX "B"

21 U.S.C. §846: "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object or the attempt of the conspiracy."

21 U.S.C. §841(a)(1): "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —

(1) To manufacture, distribute or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance."

21 U.S.C. §843(b): "It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the comission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter. Such separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term 'communication facility' means any and all public and private instruments used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, and all other means of communication."

APPENDIX "C"

United States District Court

DEFENDANT

COUNSEL

PLEA

FINDINGS & JUDGMENT

SENTENCE OR PROBATION ORDER

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

COMMITMENT RECOMMENDATION

JUN 24 1977

Count 1 - Four (4) Years, with a special parole term of Five (5) Years, to commence at the expiration of the sentence imposed herein.

Count 15 - Three (3) Years, to run concurrently with the sentence imposed in Count 1.

6-24-77

APPENDIX "D"

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JANUARY TERM — FEBRUARY 15, 1979

Before The Honorable William J. Holloway, Circuit Judge
The Honorable Monroe G. McKay, Circuit Judge
The Honorable Arthur J. Stanley, Jr., District Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

MAE LILLIAN BROWN,
a/k/a CHI CHI,
Defendant-Appellant.

JUDGMENT
77-1577
(D.C. No. 77 CR 42)

This cause came on to be heard on the record on appeal from the United States District Court for the Northern District of Oklahoma and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed. McKay, Circuit Judge, dissents. It is the further order of this court that Mae Lillian Brown, appellant, shall, within ten (10) days from and after the date of the filing of the mandate of this court in the district court, surrender himself to the custody of the United States Marshal for the Northern District of Oklahoma in execution of the judgment and sentence imposed upon him.

The District Court may, in its discretion, permit the appellant to surrender directly to the designated Bureau of Prisons institution for service of sentence.

/S/ HOWARD K. PHILLIPS, Clerk

APPENDIX "D"

MARCH TERM — APRIL 27, 1979

Before The Honorable Oliver Seth,
The Honorable William J. Holloway, Jr.,
The Honorable Robert H. McWilliams,
The Honorable James E. Barrett,
The Honorable William E. Doyle,
The Honorable Monroe G. McKay, and
The Honorable James K. Logan, Circuit Judges
The Honorable Arthur J. Stanley, Jr., Senior District Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

EARL WATSON, TONY LEE MAXWELL,
MAE LILLIAN BROWN, a/k/a CHI CHI,
Defendant-Appellant.

Nos. 77-1575, 77-1576, 77-1577

This matter comes on for consideration of appellants' petition for rehearing and suggestion for rehearing in banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges Holloway McKay, and Senior District Judge Stanley, to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

/S/ HOWARD K. PHILLIPS, Clerk
By: Robert L. Hoecker
Chief Deputy Clerk

APPENDIX "D"

MARCH TERM — MAY 1, 1979

Before The Honorable Oliver Seth, Chief Circuit Judge, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, Circuit Judges, and The Honorable Arthur J. Stanley, Senior District Court Judge.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

EARL WATSON, TONY LEE MAXWELL,
MAE LILLIAN BROWN, a/k/a Chi Chi,
Defendants-Appellants.

Nos. 77-1575, 77-1576, 77-1577

The court, upon its own motion and in order to correct a clerical error, vacates its order of April 27, 1979, in the captioned cases and in lieu thereof enters the following corrected order:

Upon consideration of Appellants' petition for rehearing and suggestion for rehearing in banc, the petition is denied by Circuit Judge Holloway, and Senior District Judge Stanley, to whom the cases were argued and submitted. Circuit Judge McKay, also on the hearing panel and who dissented in the opinion filed February 15, 1979, voted to grant rehearing.

The court having been polled on the suggestion for rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing is denied by Chief Judge Seth and Circuit Judges Holloway, McWilliams, Barrett, Doyle, and Logan. Circuit Judge McKay voted to grant rehearing in banc.

/S/ HOWARD K. PHILLIPS, Clerk
By: Robert L. Hoecker
Chief Deputy Clerk